



April 5, 2001

Mr. Lloyd Garza
Assistant City Attorney
City of Killeen
402 N. 2nd
Killeen, Texas 76541-5298

OR2001-1375

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145691.

The City of Killeen (the "city") received a request for five categories of information relating to complaints of excessive use of force by city police and the shooting death of a named individual. You indicate that there is no information responsive to three of these categories. You argue that information responsive to the request for pleadings or complaints made against city police alleging use of excessive force where the matter was resolved by a payment of money by the city, and the request for materials from the investigative file of the subject shooting death, is excepted from disclosure by sections 552.103 and 552.108 of the Government Code. You indicate that you will release information which is responsive to this request on the basis that its release was previously found to be required by an earlier decision of this office. You also indicate that you have withheld responsive information which you have not submitted to this office, in reliance on that earlier decision by this office. We have considered the exceptions you claim and reviewed the submitted information.¹

We first address the issue of your reliance on an earlier decision as a basis for not providing responsive information to this office for review. Section 552.301 of the Government Code generally requires a governmental body that receives a written request for information that it wishes to withhold from required public disclosure and that it considers to be within one of the Public Information Act's exceptions to disclosure to ask the attorney general to determine that the information at issue is excepted from disclosure. *See Gov't Code* § 552.301(a). However, this requirement is suspended when there has been a "previous

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determination about whether the information falls within one of the exceptions.” *See id.* The attorney general must determine whether an open records ruling constitutes a “previous determination.” *See Houston Publ’g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989), Open Records Decision No. 435 (1986). The term “previous determination” under section 552.301(a) of the Government Code means only one of two types of attorney general decisions. So long as the law, the facts, and the circumstances on which the ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure. The second type is an attorney general decision which may be relied upon so long as the elements of law, fact, and circumstances are met to support the previous decision’s conclusion, the decision concludes that a specific, clearly delineated category of information is or is not excepted from disclosure, and the decision explicitly provides that the governmental body or type of governmental body from which the information is requested, in response to future requests, is not required to seek a decision from the attorney general in order to withhold the information. Open Records Decision No 673 (2001)

You have not submitted to this office the requested witness statements or investigative reports. You note that in Open Records Decision Letter No. 2000-4791, this office found that the witness statements and investigative reports subject to that decision were excepted from disclosure under section 552.108(a)(2) of the Government Code based on your representation that the subject criminal investigation concluded without an indictment by the grand jury. You now represent that these circumstances have not changed. You contend that, since “the exact documents were protected from earlier disclosure, they remain protected.” The city is the same governmental body from which the information was previously requested. Furthermore, the applicable law has not changed. Based on your representation that the information at issue in the current request is “the exact documents” found to be excepted from disclosure in Open Records Decision Letter No. 2000-4791, and on our understanding that the facts and circumstances on which the earlier ruling was based are unchanged, we conclude that you may rely on Open Records Decision Letter No. 2000-4791 as a previous determination that the city may withhold this exact information from disclosure.

In reliance on Open Records Decision Letter No. 2000-4791, you state that the city will release certain information to the requestor. You have referred to this information as “attachment H,” but it is labeled as “attachment G” in the submitted materials. We agree that the prior ruling requires the city to release “attachment G” to the requestor.

We note that the submitted materials include information that the city may not withhold pursuant to a permissive exception to disclosure. Section 552.022 of the Government Code provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section provides:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (18) a settlement agreement to which a governmental body is a party.

Sections 552.103 and 552.108 of the Government Code are permissive exceptions, and do not make information "confidential under other law." See Open Records Decision Nos. 551 (1990), 522 (1989). Attachment D of the submitted materials consists of a settlement agreement with attendant attachments. This information must be released under section 552.022(a) of the Government Code.

We note that the above discussion disposes of all of the submitted information except for the responsive photographs. You contend that these photographs are excepted from disclosure by section 552.103(a) of the Government Code. This "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body claiming this exception has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c).

You have supplied a copy of a claim letter from the mother of an individual who was shot to death by a city policeman. The letter alleges that excessive force was used by the policeman in this incident, and expresses an intent to sue. You acknowledge that this claim letter complies with the notice requirements of Chapter 1 of the Civil Practices and Remedy Code, the Texas Tort Claims Act and with the applicable provisions of the City Charter. You have thereby established reasonable anticipation of litigation. See Open Records Decision No. 638 (1996) (fact that governmental body received claim letter that it represents to this office to be in compliance with notice requirements of Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance shows that litigation is reasonably anticipated).

You indicate that the submitted photographs are investigative photographs of the scene and are part of the investigative file. The anticipated litigation is based on an allegation of the use of excessive force. We conclude that the photographs relate to this anticipated litigation.

Absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Assuming that the opposing parties in the anticipated litigation have not seen or had access to any of these photographs, you may withhold this information pursuant to section 552.103(a) of the Government Code.

In conclusion, you must release attachments "D" and "G" of the submitted materials. Based on section 552.103(a) of the Government Code, you may withhold the responsive photographs in attachment "E" that the opposing party in litigation has not had access to. You may rely on Open Records Decision Letter No. 2000-4791 to withhold the witness statements and investigative reports that ruling found to be excepted from disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns", written in a cursive style.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 145691

Encl: Submitted documents

cc: Mrs. Rosie Vanarsdale
712 West Washington Avenue
Copperas Cove, Texas 76522
(w/o enclosures)